

Appl. No. 09/491,727  
Appeal Brief dated July 24, 2007  
Appeal Brief Transmittal of July 24, 2007

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**CERTIFICATE OF MAILING**

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*Wesley J. Smith*  
Attorney for Applicant(s)

PATENT APPLICATION  
Docket No. AUZ-001 P

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant(s):	David M. Austin et al.	)	
		)	
Serial No.:	09/491,727	)	
		)	
Filed:	January 27, 2000	)	Group Art
		)	Unit: 2131
For:	DETECTION OF OBSERVER PROGRAMS AND COUNTERMEASURES AGAINST OBSERVER PROGRAMS	)	
		)	
Examiner:	Syed Zia	)	

**APPEAL BRIEF TRANSMITTAL**

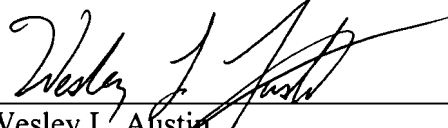
Mail Stop Appeal Brief - Patents  
Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

Dear Sir:

Appellants' Appeal Brief is being filed herewith. The fee for filing the Appeal Brief was previously submitted on June 20, 2005.

Appl. No. 09/491,727  
Appeal Brief dated July 24, 2007  
Appeal Brief Transmittal of July 24, 2007

Respectfully submitted,

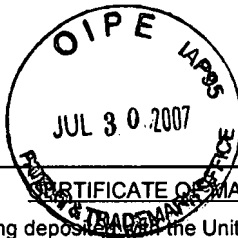
A handwritten signature in black ink, appearing to read 'Wesley L. Austin', written over a horizontal line.

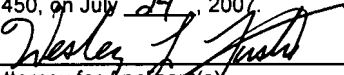
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Date: July 24, 2007

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Appl. No. 09/491,727  
Appeal Brief Dated July 24, 2007  
Reply to Office Action of March 9, 2007



<p><b>CERTIFICATE OF MAILING</b></p> <p>I hereby certify that this correspondence is being deposited with the United States Postal Service as first class mail in an envelope addressed to: Mail Stop Appeal Brief - Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450, on July 24, 2007.</p> <p> Attorney for Applicant(s)</p>
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		)	Unit: 2131
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		)	
Examiner:	Syed Zia	)	

**APPELLANTS' APPEAL BRIEF**

Mail Stop Appeal Brief - Patents  
Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

Dear Sir:

An Office Action dated March 9, 2007 rejected all pending claims (claims 1-18) in the present application. A timely Notice of Appeal was mailed on May 22, 2007 and was received by the United States Patent Office on May 24, 2007. Appellants' Appeal Brief is being filed herewith.

**1. REAL PARTY IN INTEREST**

The real party in interest is the assignee, Trapware Corporation.

## **2. RELATED APPEALS AND INTERFERENCES**

An appeal has been filed in a continuation-in-part patent application, Application No. 10/027,714.

## **3. STATUS OF CLAIMS**

Claims 1-18 are pending in the present application. Claim 19 has been canceled. Claims 20-32 have been withdrawn from consideration due to a restriction/election requirement. Claims 1-18 stand rejected under the judicially created doctrine of obviousness-type double patenting over claims 1-21 of copending Application No. 10/027,714. Claims 1-18 also stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Johnson et al, U.S. Patent No. 5,964,839 (hereinafter, "Johnson") and further in view of Togawa, U.S. Patent No. 6,240,530 (hereinafter, "Togawa").

Appellants appeal the rejections of claims 1-18.

## **4. STATUS OF AMENDMENTS**

No amendments were filed subsequent to the rejection.

## **5. SUMMARY OF CLAIMED SUBJECT MATTER**

As stated in the background section of the patent application, software has been developed to observe or monitor computer users. These software programs provide a wide variety of monitoring features. For example, some of these programs are able to log keystrokes of a user, log menu commands, take screen shots of a user's computer screen at various times, track use of various programs, track what web sites have been visited, monitor e-mail communications, etc. With the technology available today, most, if not all, of a computer user's activities on a computer can be observed and recorded. See the Appellants' patent application (hereinafter referred to as the "Specification"), page 3, lines 1-22.

With the computer technology of today and with the observing programs now available and for those programs that will surely be developed and used in the future, computer users may be watched by third parties more often than many think. It would be highly beneficial to computer

users if they could find out whether they are being observed by computer software and technology and to know information about the observing activity and/or program. Specification, page 3, lines 1-22.

As presently claimed, a new system has been developed for detecting an observing program on a computer system as including accessing instructions that access observer data. One or more embodiments of an observer program are described in the Specification on page 14, lines 9-23, page 15, lines 1-14, and Figure 2. The observer data includes data descriptive of the observer program. The observer program is programmed to observe a user's activities on the computer system and also operates to create data from its observations. The system also includes reading instructions that read memory of the computer system to obtain memory data. Further, the system includes comparing instructions that compare the observer data with memory data read in from memory to determine whether the observer program is present on the computer system. One or more embodiments of the system and how it detects an observer program are described in the Specification on page 17, lines 8-22, page 18, lines 1-23, page 19, lines 1-23, page 20, lines 1-23, page 21, lines 1-23, 9-23, and Figure 3. The system also includes generating instructions that generate results from the reading and comparing. The results generated indicate whether the observer program is present on the computer system. In addition, the system includes outputting instructions that obtain the results and provide the results for a user. The outputting instructions may provide the results to a user through a graphical user interface.

As required by 37 C.F.R. § 41.37(c)(1)(v), a summary of claimed subject matter immediately follows. The references to the specification refer only to embodiments of the invention. The invention is defined by the claims. Accordingly, these references to the specification are not meant to limit the scope of the claims of the present invention in any way but are only provided because they are mandated by 37 C.F.R. § 41.37(c)(1)(v). All references are to the patent specification.

1. A system for detecting the presence of an observing program on a computer system, wherein the observing program is programmed to observe a user's activities on the computer system by monitoring user input entered through a user input device and to create data from the observing

on the computer system, the system including computer software for running on the computer system, the system comprising:

observer data that includes data descriptive of an observer program, the observer program being programmed to observe a user's activities on the computer system by monitoring user input entered through a user input device and also operating to create a log file from the observing of the observer program; (pg. 9, lines 6-8; pg. 10, lines 4-15; pg. 14, lines 9-23; pg. 15, lines 1-23; pg. 16, lines 1-23; pg. 17, lines 1-7; Figure 2, elements 34-48; pg. 19, lines 1-23; pg. 20, lines 1-23; pg. 21, lines 1-23)

accessing instructions that access the observer data; (pg. 9, lines 5-6; pg. 10, lines 16-23; pg. 11, lines 1-8; pg. 17, lines 8-23; pg. 18, lines 1-23; pg. 19, lines 1-23; pg. 20, lines 1-23; pg. 21, lines 1-23; Figure 3, elements 50-60; pg. 23, lines 5-23; pg. 24, lines 1-23; pg. 25, lines 1-23; pg. 26, lines 1-23; pg. 27, lines 1-23; Figure 5; Figure 6)

reading instructions that read memory of the computer system to obtain memory data; (pg. 9, lines 8-10; pg. 10, lines 16-23; pg. 11, lines 1-8; pg. 11, lines 9-18; pg. 17, lines 8-23; pg. 18, lines 1-23; pg. 19, lines 1-23; pg. 20, lines 1-23; pg. 21, lines 1-23; Figure 3, elements 50-60; pg. 23, lines 5-23; pg. 24, lines 1-23; pg. 25, lines 1-23; pg. 26, lines 1-23; pg. 27, lines 1-23; Figure 5; Figure 6)

comparing instructions that compare the observer data with memory data read in from memory to determine whether the observer program is present on the computer system; (pg. 9, lines 10-12, 15-24; pg. 10, lines 16-23; pg. 11, lines 1-8; pg. 18, lines 1-23; pg. 19, lines 1-23; pg. 20, lines 1-23; pg. 21, lines 1-23; Figure 3, elements 50-60; pg. 23, lines 5-23; pg. 24, lines 1-23; pg. 25, lines 1-23; pg. 26, lines 1-23; pg. 27, lines 1-23; Figure 5; Figure 6)

generating instructions that generate results from the comparing, wherein the results generated indicate whether the observer program is present on the computer system; and (pg. 9, lines 12-15, 15-24; pg. 10, lines 16-23; pg. 11, lines 1-8; pg.

22, lines 5-11; Figure 4; pg. 23, lines 5-23; pg. 24, lines 1-23; pg. 25, lines 1-23; pg. 26, lines 1-23; pg. 27, lines 1-23; Figure 5; Figure 6)

outputting instructions that obtain the results and provide the results for a user. (pg. 10, lines 1-3; pg. 10, lines 16-23; pg. 11, lines 1-8; pg. 22, lines 5-11; Figure 4; pg. 23, lines 5-23; pg. 24, lines 1-23; pg. 25, lines 1-23; pg. 26, lines 1-23; pg. 27, lines 1-23; Figure 5; Figure 6)

16. A system for detecting the presence of an observing program on a computer system, wherein the observing program is programmed to observe a user's activities on the computer system by monitoring user input entered through a user input device and to create data from the observing on the computer system, the system including computer software for running on the computer system, the system comprising:

observer data that includes data descriptive of an observer program, the observer program being programmed to observe a user's activities on the computer system by monitoring user input entered through a user input device and also operating to create a log file from the observing of the observer program; (pg. 9, lines 6-8; pg. 10, lines 4-15; pg. 14, lines 9-23; pg. 15, lines 1-23; pg. 16, lines 1-23; pg. 17, lines 1-7; Figure 2, elements 34-48; pg. 19, lines 1-23; pg. 20, lines 1-23; pg. 21, lines 1-23)

means for accessing the observer data; (pg. 9, lines 5-6; pg. 10, lines 16-23; pg. 11, lines 1-8; pg. 17, lines 8-23; pg. 18, lines 1-23; pg. 19, lines 1-23; pg. 20, lines 1-23; pg. 21, lines 1-23; Figure 3, elements 50-60; pg. 23, lines 5-23; pg. 24, lines 1-23; pg. 25, lines 1-23; pg. 26, lines 1-23; pg. 27, lines 1-23; Figure 5; Figure 6)

means for reading memory of the computer system to obtain memory data; (pg. 9, lines 8-10; pg. 10, lines 16-23; pg. 11, lines 1-8; pg. 11, lines 9-18; pg. 17, lines 8-23; pg. 18, lines 1-23; pg. 19, lines 1-23; pg. 20, lines 1-23; pg. 21, lines 1-23; Figure 3, elements 50-60; pg. 23, lines 5-23; pg. 24, lines 1-23; pg. 25, lines 1-23; pg. 26, lines 1-23; pg. 27, lines 1-23; Figure 5; Figure 6)

means for comparing the observer data with memory data to determine whether the observer program is present on the computer system; (pg. 9, lines 10-12, 15-24; pg. 10, lines 16-23; pg. 11, lines 1-8; pg. 18, lines 1-23; pg. 19, lines 1-23; pg. 20, lines 1-23; pg. 21, lines 1-23; Figure 3, elements 50-60; pg. 23, lines 5-23; pg. 24, lines 1-23; pg. 25, lines 1-23; pg. 26, lines 1-23; pg. 27, lines 1-23; Figure 5; Figure 6)

means for generating results from the comparison, wherein the results generated indicate whether the observer program is present on the computer system; and (pg. 9, lines 12-15, 15-24; pg. 10, lines 16-23; pg. 11, lines 1-8; pg. 22, lines 5-11; Figure 4; pg. 23, lines 5-23; pg. 24, lines 1-23; pg. 25, lines 1-23; pg. 26, lines 1-23; pg. 27, lines 1-23; Figure 5; Figure 6)

means for outputting the results for a user. (pg. 10, lines 1-3; pg. 10, lines 16-23; pg. 11, lines 1-8; pg. 22, lines 5-11; Figure 4; pg. 23, lines 5-23; pg. 24, lines 1-23; pg. 25, lines 1-23; pg. 26, lines 1-23; pg. 27, lines 1-23; Figure 5; Figure 6)

17. A method for detecting the presence of an observing program on a computer system, wherein the observing program is programmed to observe a user's activities on the computer system by monitoring user input entered through a user input device and to create data from the observing on the computer system, the method being implemented through computer software for running on the computer system, the method comprising the steps of:

accessing observer data, the observer data including data descriptive of an observer program, the observer program being programmed to observe a user's activities on the computer system by monitoring user input entered through a user input device and also operating to create a log file from the observing of the observer program; (pg. 9, lines 5-6; pg. 10, lines 16-23; pg. 11, lines 1-8; pg. 17, lines 8-23; pg. 18, lines 1-23; pg. 19, lines 1-23; pg. 20, lines 1-23; pg. 21, lines 1-23; Figure 3, elements 50-60; pg. 23, lines 5-23; pg. 24, lines 1-23; pg. 25, lines 1-23; pg. 26, lines 1-23; pg. 27, lines 1-23; Figure 5; Figure 6)



reading memory of the computer system to obtain memory data; (pg. 9, lines 8-10; pg. 10, lines 16-23; pg. 11, lines 1-8; pg. 11, lines 9-18; pg. 17, lines 8-23; pg. 18, lines 1-23; pg. 19, lines 1-23; pg. 20, lines 1-23; pg. 21, lines 1-23; Figure 3, elements 50-60; pg. 23, lines 5-23; pg. 24, lines 1-23; pg. 25, lines 1-23; pg. 26, lines 1-23; pg. 27, lines 1-23; Figure 5; Figure 6)

comparing the observer data with memory data read in from memory to determine whether the observer program is present on the computer system; (pg. 9, lines 10-12, 15-24; pg. 10, lines 16-23; pg. 11, lines 1-8; pg. 18, lines 1-23; pg. 19, lines 1-23; pg. 20, lines 1-23; pg. 21, lines 1-23; Figure 3, elements 50-60; pg. 23, lines 5-23; pg. 24, lines 1-23; pg. 25, lines 1-23; pg. 26, lines 1-23; pg. 27, lines 1-23; Figure 5; Figure 6)

generating results from the reading and comparing, wherein the results generated indicate whether the observer program is present on the computer system; and (pg. 9, lines 12-15, 15-24; pg. 10, lines 16-23; pg. 11, lines 1-8; pg. 22, lines 5-11; Figure 4; pg. 23, lines 5-23; pg. 24, lines 1-23; pg. 25, lines 1-23; pg. 26, lines 1-23; pg. 27, lines 1-23; Figure 5; Figure 6)

outputting the results for a user. (pg. 10, lines 1-3; pg. 10, lines 16-23; pg. 11, lines 1-8; pg. 22, lines 5-11; Figure 4; pg. 23, lines 5-23; pg. 24, lines 1-23; pg. 25, lines 1-23; pg. 26, lines 1-23; pg. 27, lines 1-23; Figure 5; Figure 6)

18. A computer-readable medium containing instructions for detecting the presence of an observing program on a computer system, wherein the observing program is programmed to observe a user's activities on the computer system by monitoring user input entered through a user input device and to create data from the observing on the computer system, wherein the instructions are executable to:

access observer data, the observer data including data descriptive of an observer program, the observer program being programmed to observe a user's activities on the computer system by monitoring user input entered through a user input device and also operating to create a log file from the observing of the observer program;

(pg. 9, lines 5-6; pg. 10, lines 16-23; pg. 11, lines 1-8; pg. 17, lines 8-23; pg. 18, lines 1-23; pg. 19, lines 1-23; pg. 20, lines 1-23; pg. 21, lines 1-23; Figure 3, elements 50-60; pg. 23, lines 5-23; pg. 24, lines 1-23; pg. 25, lines 1-23; pg. 26, lines 1-23; pg. 27, lines 1-23; Figure 5; Figure 6)

read memory of the computer system to obtain memory data; (pg. 9, lines 8-10; pg. 10, lines 16-23; pg. 11, lines 1-8; pg. 11, lines 9-18; pg. 17, lines 8-23; pg. 18, lines 1-23; pg. 19, lines 1-23; pg. 20, lines 1-23; pg. 21, lines 1-23; Figure 3, elements 50-60; pg. 23, lines 5-23; pg. 24, lines 1-23; pg. 25, lines 1-23; pg. 26, lines 1-23; pg. 27, lines 1-23; Figure 5; Figure 6)

compare the observer data with memory data read in from memory to determine whether the observer program is present on the computer system; (pg. 9, lines 10-12, 15-24; pg. 10, lines 16-23; pg. 11, lines 1-8; pg. 18, lines 1-23; pg. 19, lines 1-23; pg. 20, lines 1-23; pg. 21, lines 1-23; Figure 3, elements 50-60; pg. 23, lines 5-23; pg. 24, lines 1-23; pg. 25, lines 1-23; pg. 26, lines 1-23; pg. 27, lines 1-23; Figure 5; Figure 6)

generate results from the read and compare, wherein the results generated indicate whether the observer program is present on the computer system; and (pg. 9, lines 12-15, 15-24; pg. 10, lines 16-23; pg. 11, lines 1-8; pg. 22, lines 5-11; Figure 4; pg. 23, lines 5-23; pg. 24, lines 1-23; pg. 25, lines 1-23; pg. 26, lines 1-23; pg. 27, lines 1-23; Figure 5; Figure 6)

output the results for a user. (pg. 10, lines 1-3; pg. 10, lines 16-23; pg. 11, lines 1-8; pg. 22, lines 5-11; Figure 4; pg. 23, lines 5-23; pg. 24, lines 1-23; pg. 25, lines 1-23; pg. 26, lines 1-23; pg. 27, lines 1-23; Figure 5; Figure 6)

## **6. GROUNDS OF REJECTIONS TO BE REVIEWED ON APPEAL**

The following issues are presented for review:

I. Whether the obviousness-type double patenting rejection of claims 1-18 of the present application over claims 1-21 of copending Application No. 10/027,714 is proper.

II. Whether claims 1-18 are unpatentable under 35 U.S.C. § 103(a) as being obvious over Johnson et al, U.S. Patent No. 5,964,839 (hereinafter, "Johnson") and further in view of Togawa, U.S. Patent No. 6,240,530 (hereinafter, "Togawa").

## **7. ARGUMENT**

### **A. Rejection of Claims 1-18 under the Judicially Created Doctrine of Obviousness-Type Double Patenting**

The Office Action rejected claims 1-18 under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-21 of copending U.S. Patent Application No. 10/027,714. This rejection was a provisional rejection.

The procedures regarding double patenting rejections of two copending applications are set forth in M.P.E.P. § 1490. The M.P.E.P. states that "[i]f the [obviousness-type double patenting] rejection is the only rejection remaining in the earlier filed of the two pending applications, (but the later filed application is rejectable on other grounds), the examiner should then withdraw that rejection and permit the earlier-filed application to issue as a patent without a terminal disclaimer." M.P.E.P. § 1490. The present application is the parent, or earlier filed application, and therefore if this application were to become allowable before the rejected copending application, the Examiner should permit this application to issue without the terminal disclaimer.

Appellants believe this rejection to be improper. The present application was filed on January 27, 2000. The copending patent application (U.S. Patent Application No. 10/027,714) is a child of the present application and was filed on December 21, 2001. "The doctrine of double patenting seeks to prevent the unjustified extension of patent exclusivity beyond the term of a patent." M.P.E.P. § 804. In the present application, Appellants cannot conceive of how the term of a patent on the present application could be unjustifiably extended. Whether or not an obviousness-type double patenting rejection is proper in the child application (U.S. Patent Application No. 10/027,714), with a filing date of December 21, 2001, is not the issue. The issue presently before the Board of Patent Appeals and Interferences is whether this rejection is

proper in the present case, which has a filing date of January 27, 2000. Reversal of the Office Action's obviousness-type double patenting rejection is respectfully requested.

**B. Rejection of Claims 1-18 under 35 U.S.C. § 103(a)**

The Examiner rejected claims 1-18 under 35 U.S.C. § 103(a) as being unpatentable over Johnson et al, U.S. Patent No. 5,964,839 (hereinafter, "Johnson") and further in view of Togawa, U.S. Patent No. 6,240,530 (hereinafter, "Togawa"). This rejection is respectfully traversed.

The factual inquiries that are relevant in the determination of obviousness are determining the scope and contents of the prior art, ascertaining the differences between the prior art and the claims in issue, resolving the level of ordinary skill in the art, and evaluating evidence of secondary consideration. KSR Int'l Co. v. Teleflex Inc., 550 U.S. \_\_\_, 2007 U.S. LEXIS 4745, at \*\*4-5 (2007) (citing Graham v. John Deere Co. of Kansas City, 383 U.S. 1, 17-18 (1966)). To establish a *prima facie* case of obviousness, the prior art references "must teach or suggest all the claim limitations." M.P.E.P. § 2142. Moreover, the analysis in support of an obviousness rejection "should be made explicit." KSR, 2007 U.S. LEXIS 4745, at \*\*37. "[R]ejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness." Id. (citing In re Kahn, 441 F.3d 977, 988 (Fed. Cir. 2006)).

Appellants respectfully submit that the claims at issue are patentably distinct from the cited references. The cited references do not teach or suggest all of the limitations in the claims.

Claim 1 recites "accessing instructions that access observer data", and "observer data that includes data descriptive of an observer program." Claim 1 further recites "outputting instructions that obtain the results and provide the results for a user." Claim 1 also states "wherein the results generated indicate whether the observer program is present on the computer system." Johnson does not teach or suggest these claim elements. Johnson teaches a "system and method for the monitoring and collection of all inbound/outbound information activity and communications activity at a particular user location, for example, a household equipped with a variety of devices having communication capabilities." Johnson, Abstract. Indeed, the title of Johnson is "system and method for monitoring information flow and performing data

collection.” Id., Title. From a reading of Johnson it appears that Johnson is a kind of system for monitoring devices, including computer use. The Examiner may assert that Johnson is a type of observer program itself, mentioned by Appellants in Appellants’ patent specification. However Johnson does not teach or suggest all of the elements of the claimed invention and, at most, merely discloses a type of observer program. In further support of Johnson merely being some kind of observer, Johnson states the following:

An object of the present invention is thus to provide a system and method for the monitoring and collection of all inbound/outbound information activity and communications activity at a particular user location, for example, a household equipped with a variety of devices having communication capabilities. . . . The information is collected in real-time, on an operation-by-operation basis, and is ultimately aggregated, for example, at the household level in a central location within the household. The aggregated data is thereafter transmitted to a central server for data analysis purposes.

Id., Col. 2, lines 66-67, Col. 3, lines 1-4, 14-19. Johnson appears to be capable of monitoring or observing more than just a typical computer, as shown by the following:

In accordance with an aspect of the present invention, aggregator 20 will collect inbound and outbound information regarding the activities of various hardware devices such as a laptop computer 22, personal computer 24, workstation 30, facsimile machine 26, information appliance 31, telephone 38, set top box 32, entertainment center 34 and television 36. These devices may, for example, be co-located within a single user household. The inbound and outbound activities being monitored include items such as on-line information service usage (e.g., Prodigy or CompuServe) and information regarding the facility used to engage the service (e.g., the Internet). In accordance with an aspect of the invention, the real-time interaction between a user and such a commercial on-line information service 50 is monitored to collect information such as, but not limited to, type of services accessed by the user, time spent using each individual service, type and quantity of information downloaded by user, the time of day the user logged on the service, total connect time and data exchange rate. Advantageously, this real-time information is periodically collected from the individual devices being monitored by aggregator 20 and sent to server 10 where the data is analyzed to indicate certain user trends.

Id., Col. 4, lines 38-60. However, Johnson's abilities to observe and monitor various devices does nothing to help teach or suggest the following limitations from claim 1: "accessing instructions that access observer data," "observer data that includes data descriptive of an observer program," "outputting instructions that obtain the results and provide the results for a user," and "wherein the results generated indicate whether the observer program is present on the computer system." The Office Action cited Columns 12-14 of Johnson to support its assertion that Johnson taught these claim elements. However, as will be shown by Appellants, columns 12-14 do not teach or suggest these claims elements either.

Column 12, line 51 of Johnson (cited by the Office Action) states that "[d]esktop activity is monitored by capturing key strokes and monitoring movement and use of the mouse or pointing device. The desktop activity monitor according to the present invention is capable of determining and storing the length of time that an application is active." Id., Col. 12, lines 51-55. Columns 13 and 14 of Johnson, also cited by the Office Action, further support Appellants' assertion that Johnson is merely some kind of snooper program itself.

When the monitor interface program is loaded, it sets up and allocates data buffers and records for storing application activity data in memory, creates files for storing application activity data on disk and initializes and loads the infiltration module. Upon loading, the monitor interface program builds sets of records for the programs/applications that are currently loaded on the computer system. At set intervals, the monitor interface program takes a snapshot of the current list of loaded and active programs in the system. . . .

The current application list is compared to the previous application list to determine if any applications have been added or removed. If an application has been added (loaded), a new record is created to hold the application's activity information and the record is added to the "active applications record list". If an application has been removed (unloaded) then the applications activity record is updated, the record is transferred to disk, and the entry is removed from the active application records list.

When keystrokes are received, the infiltration module increments the keystroke counters and then passes the keystroke data to the target keyboard device driver. The keystroke counter is periodically polled by the monitor interface program to determine

if there has been any keyboard activity during a specified interval of time.

Id., Col. 13, lines 54-63, Col. 14, lines 1-15.

As shown, Johnson does not teach or suggest these claim elements from claim 1. Namely, claim 1 recites “accessing instructions that access observer data”, and “observer data that includes data descriptive of an observer program.” Claim 1 further recites “outputting instructions that obtain the results and provide the results for a user.” Claim 1 also states “wherein the results generated indicate whether the observer program is present on the computer system.” Johnson does not teach or suggest these claim elements.

Claim 1 also recites “comparing instructions that compare the observer data with memory data read in from memory to determine whether the observer program is present on the computer system.” The Office Action admits that Johnson does not teach or suggest this claim element. Office Action (mailed March 9, 2007), Page 5. However, Togawa also does not teach or suggest this claim element either.

Togawa does not teach or suggest “comparing instructions that compare the observer data with memory data read in from memory to determine whether the observer program is present on the computer system.” The Office Action has cited a portion of Togawa as teaching or suggesting this claim element. This portion of Togawa is as follows:

According to a further aspect of the present invention, there is provided an information processing apparatus which includes a memory for storing programs and data for information processing and a processing section for executing the programs to perform various information processing, comprising a virus detection and identification section for detecting a computer virus which infects the information processing apparatus and identifying a type of the detected computer virus, a virus type information registration section for registering information regarding the type of the detected computer virus identified by the virus detection and identification section into a storage area which is access-disabled in an ordinary operation of the information processing apparatus, a trigger information outputting section for outputting trigger information so that the information processing apparatus may enter a processing mode for performing virus extermination, a stored information clearing section operable in response to the trigger information from the trigger information outputting section for

clearing information stored in all of those areas of the memory which are access-enabled in an ordinary operation of the information processing apparatus, an operating system fetching and starting up section for fetching an operating system from the outside and starting up the operating system after the stored information is cleared by the stored information clearing section, and a virus extermination section for exterminating, in operation environment of the operating system started up by the operating system fetching and starting up section, the computer virus which infects the memory of the information processing apparatus based on the information regarding the type of the detected virus registered in the virus type information storage section.

Togawa, Col. 5, lines 7-38.

This portion of Togawa does not teach or suggest “comparing instructions that compare the observer data with memory data read in from memory to determine whether the observer program is present on the computer system.” This portion of Togawa identifies “virus detection and identification section for detecting a computer virus,” “a virus type information registration section for registering information regarding the type of the detected computer virus identified by the virus detection,” and “a virus extermination section for exterminating . . . the computer virus.” Later Togawa states that if “such an infecting computer virus is detected in the virus detection and identification step S1 . . . , then information stored in all of those areas of a memory . . . is cleared in the memory clearing step S3.” Togawa, Col. 8, lines 25-30. This simply does not teach or suggest “comparing instructions that compare the observer data with memory data read in from memory to determine whether the observer program is present on the computer system.” This claim limitation requires all of the elements therein including (1) “comparing instructions that compare the observer data with memory data read in from memory,” and (2) “to determine whether the observer program is present on the computer system.”

As shown, neither Johnson nor Togawa teach or suggest all of the limitations in claim 1. As a result, Appellants respectfully request that the rejection of claim 1 be withdrawn.

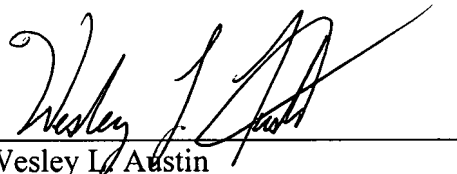


As set forth above, neither Johnson nor Togawa teach or suggest all of the limitations in claim 1. Claims 2-15 depend directly or indirectly from claim 1. Thus, Appellants respectfully request that the rejection of claims 2-15 be withdrawn for at least the same reasons.

As set forth above, neither Johnson nor Togawa teach or suggest all of the limitations in claim 1. Claims 16-18 include similar elements as identified above in the arguments with respect to claim 1. Thus, Appellants respectfully request that the rejection of claims 16-18 be withdrawn for at least the same reasons.

Appellants respectfully assert that claims 1-18 are patentably distinct from the cited references. For the reasons discussed above, reversal of the Examiner's rejections and allowance of the pending claims is respectfully requested.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Wesley L. Austin', is written over a horizontal line.

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## **CLAIMS APPENDIX**

### **Listing of Claims involved in the appeal:**

1. A system for detecting the presence of an observing program on a computer system, wherein the observing program is programmed to observe a user's activities on the computer system by monitoring user input entered through a user input device and to create data from the observing on the computer system, the system including computer software for running on the computer system, the system comprising:

observer data that includes data descriptive of an observer program, the observer program being programmed to observe a user's activities on the computer system by monitoring user input entered through a user input device and also operating to create a log file from the observing of the observer program;

accessing instructions that access the observer data;

reading instructions that read memory of the computer system to obtain memory data;

comparing instructions that compare the observer data with memory data read in from memory to determine whether the observer program is present on the computer system;

generating instructions that generate results from the comparing, wherein the results generated indicate whether the observer program is present on the computer system; and

outputting instructions that obtain the results and provide the results for a user.

2. The system of claim 1 wherein the reading instructions read the memory of the computer system by querying the operating system of the computer system for the tasks running and by examining task information provided by the operating system.
3. The system of claim 1 wherein the outputting instructions provide the results to a user through a graphical user interface.
4. The system of claim 1 wherein the reading instructions read the memory of the computer system by querying the file system of the computer system for the files located on storage media and by examining file information provided by the file system.
5. The system of claim 1 wherein the reading instructions read the memory of the computer system by opening a file located on storage media and by examining contents of the file.
6. The system of claim 1 wherein the observer data includes data descriptive of a plurality of observer programs and wherein the system compares the observer data with the memory data to determine whether any known observer program is present.
7. The system of claim 1 further comprising countermeasure instructions wherein the countermeasure instructions alter the operation of the observer program.

8. The system of claim 7 wherein the countermeasure instructions alter the operation of the observer program by observer program configuration data.
9. The system of claim 7 wherein the countermeasure instructions alter the operation of the observer program by altering a file on the computer system.
10. The system of claim 7 wherein the countermeasure instructions alter the operation of the observer program by altering reporting data generated by the observer program.
11. The system of claim 7 wherein the countermeasure instructions alter the operation of the observer program by replacing reporting data generated by the observer program.
12. The system of claim 7 wherein the countermeasure instructions alter the operation of the observer program by replacing a file of the observer program.
13. The system of claim 1 wherein the observer data includes data descriptive of observing activity typical of observing programs and wherein the system compares the observer data with the memory data to determine whether any known observer program is present.
14. The system of claim 1 further comprising the observer data, wherein the observer data includes a list of files and modules that are part of the observer program software, and wherein the reading instructions read the memory of the computer system by querying

the operating system of the computer system for the tasks running and by examining task information provided by the operating system, and wherein the reading instructions also read the memory of the computer system by querying the file system of the computer system for the files located on storage media and by examining file information provided by the file system, and wherein the outputting instructions provide the results to a user through a graphical user interface.

15. The system of claim 1 wherein the system is made available over a computer network through a web site.

16. A system for detecting the presence of an observing program on a computer system, wherein the observing program is programmed to observe a user's activities on the computer system by monitoring user input entered through a user input device and to create data from the observing on the computer system, the system including computer software for running on the computer system, the system comprising:

observer data that includes data descriptive of an observer program, the observer program being programmed to observe a user's activities on the computer system by monitoring user input entered through a user input device and also operating to create a log file from the observing of the observer program;

means for accessing the observer data;

means for reading memory of the computer system to obtain memory data;

means for comparing the observer data with memory data to determine whether the observer program is present on the computer system;

means for generating results from the comparison, wherein the results generated indicate whether the observer program is present on the computer system; and

means for outputting the results for a user.

17. A method for detecting the presence of an observing program on a computer system, wherein the observing program is programmed to observe a user's activities on the computer system by monitoring user input entered through a user input device and to create data from the observing on the computer system, the method being implemented through computer software for running on the computer system, the method comprising the steps of:

accessing observer data, the observer data including data descriptive of an observer program, the observer program being programmed to observe a user's activities on the computer system by monitoring user input entered through a user input device and also operating to create a log file from the observing of the observer program;

reading memory of the computer system to obtain memory data;

comparing the observer data with memory data read in from memory to determine whether the observer program is present on the computer system;

generating results from the reading and comparing, wherein the results generated indicate whether the observer program is present on the computer system; and

outputting the results for a user.

18. A computer-readable medium containing instructions for detecting the presence of an observing program on a computer system, wherein the observing program is programmed to observe a user's activities on the computer system by monitoring user input entered through a user input device and to create data from the observing on the computer system, wherein the instructions are executable to:

access observer data, the observer data including data descriptive of an observer program,  
the observer program being programmed to observe a user's activities on the  
computer system by monitoring user input entered through a user input device and  
also operating to create a log file from the observing of the observer program;  
read memory of the computer system to obtain memory data;  
compare the observer data with memory data read in from memory to determine whether  
the observer program is present on the computer system;  
generate results from the read and compare, wherein the results generated indicate  
whether the observer program is present on the computer system; and  
output the results for a user.

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**EVIDENCE APPENDIX**

NONE.



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**RELATED PROCEEDINGS APPENDIX**

NONE.